

IN THE COURT OF APPEAL, FIJI ISLANDS  
APPELLATE JURISDICTION

Criminal Appeal No: AAU0112 of 2008

BETWEEN:

JOELI TAWATATAU

Appellant

AND:

THE STATE

Respondent

Coram: Goundar JA  
Calanchini JA

Hearing: 28<sup>th</sup> May 2010

Counsel: Appellant in person  
Ms A. Tuiketeti for State

Date of Judgment: 11<sup>th</sup> June 2010

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**JUDGMENT OF THE COURT**

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[1] This is an appeal from a judgment of the High Court in its appellate jurisdiction.

- [2] On 2 June 2008, the appellant appeared in the Nasinu Magistrates' Court on one charge of office breaking entering and larceny. He waived his right to counsel and pleaded not guilty. On 22 July 2008, he was convicted after a trial. He was sentenced to four years imprisonment on 30 July 2008.
- [3] He appealed against conviction and sentence to the High Court, although no grounds appear to have been filed against sentence. On 12 December 2008 the High Court dismissed the appeal against conviction without considering the sentence that was imposed on the appellant.
- [4] He filed a timely appeal to this Court raising a number of grounds of appeal.
- [5] As this is an appeal from the High Court in its appellate jurisdiction, the appellant is limited by section 22 of the Court of Appeal Act to any ground which involves a question of law only.
- [6] Section 22 reads:

(1) Any party to an appeal from a magistrate's court to the High Court may appeal under this Part, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only.

Provided that no appeal shall lie against the confirmation by the High Court of a verdict of acquittal by a magistrate's court.

(1A) No appeal under subsection(1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground –

(a) the sentence was an unlawful one or was passed in consequence of an error of law; or

(b) that the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence.

- [7] At trial, the only evidence that was led against the appellant implicating him to the offence was that a stolen Tabua (whale's tooth) was found buried in his garden and that he fled his house when the police made a raid.
- [8] The grounds of appeal filed in this Court challenge the factual findings made by the trial court based on the circumstantial evidence of recent possession of a stolen property and which were confirmed by the High Court on appeal. In his submissions to this Court, the appellant took the view that the trial court could not have arrived at those findings of fact on the evidence.
- [9] Having considered the grounds of appeal against conviction we are satisfied that no error of law has been shown to give the appellant a right of appeal against conviction. The appeal against conviction is dismissed.
- [10] The only ground of appeal against sentence is that it is severe. The appellant did not make any submissions on appeal against sentence.
- [11] As we have said earlier, the only grounds upon which this Court can hear such an appeal are that the sentence was unlawful or passed in consequence of an error of law.
- [12] The maximum penalty prescribed for the offence of office breaking, is fourteen years imprisonment. The maximum sentence that a Magistrate could impose on one count is 10 years imprisonment. The sentence of four years imprisonment therefore is not unlawful.

[13] However, the manner in which the learned magistrate dealt with the aggravating factors gives us some concern.

[14] Paragraphs 7 and 8 of the sentencing remarks read:

"Aggravating factors are as follows:

- (i) You showed total disregard to the complainant's property rights, by stealing \$10,000 worth of properties from his work premise.
- (ii) Most of the above properties have not been recovered. Only 1 tabua, was recovered.
- (iii) You have 31 previous convictions in the last 10 years. Most of which are for Larceny, Office and Shop Break-in type offences. Although you've been punished for those offences, you appear not to have changed your attitude to become a better citizen and also not to bring miseries to others. You simply haven't changed your negative attitudes.
- (iv) Furthermore, by breaking into the complainants' office, you have shown total disregard to their right to privacy and their right to enjoy their business in a peaceful environment.

As a result of the above, I increase your sentence by 2½ years, making a total of 4 years prison."

[15] In our view, the fact that a substantial amount of stolen properties remains unrecovered, is the only aggravating factor recognized by law. The breach of privacy of the complainant and previous convictions of the appellant are not aggravating factors in law to justify an increase in sentence.

[16] We conclude the learned magistrate erred in law to consider those factors as a matter of aggravation to increase the sentence.

[17] We also find that the failure to reduce sentence by two months which the appellant spent in custody on remand constitutes an error of law.

[18] For the reasons given, we allow the appeal against sentence.

[19] Accordingly, we make the following orders:

(1) Appeal against conviction dismissed;

(2) Appeal against sentence allowed. Sentence reduced from 4 years to 2½ years imprisonment.



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Hon. Mr. Justice D. Goundar  
Judge of Appeal

A handwritten signature in dark ink, appearing to be "W. Calanchini", written over a horizontal line.

Hon. Mr. Justice Calanchini  
Judge of Appeal

**Solicitors:**

Appellant in person

Office of the Director of Public Prosecutions for State